UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PROGME CORPORATION, Plaintiff, vs. COMCAST CORPORATION, Defendant.	Case No. 2:15-cv-13935-SJM-MJH District Judge Stephen J. Murphy, III Magistrate Judge Michael J. Hluchaniuk

COMCAST CORPORATION'S MOTIONS TO DISMISS PROGME'S INDIRECT INFRINGEMENT & WILLFULNESS CLAIMS UNDER FED. R. CIV. P. 12(B)(6), AND TO DISMISS CERTAIN DIRECT INFRINGEMENT CLAIMS UNDER FED. R. CIV. P. 12(B)(6) OR, ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT UNDER FED. R. CIV. P. 12(E)

Defendant Comcast Corporation ("Comcast") moves this Court for an order dismissing Progme Corporation's ("Progme") claims for induced and contributory infringement (referred to collectively as "indirect" infringement) and willful infringement under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Comcast further moves for dismissal of claims of direct infringement set forth in counts III-VI of the complaint, also for failing to state a claim under Fed. R. Civ. P. 12(b)(6). Alternatively, as to these counts of direct infringement, Comcast moves under Fed. R. Civ. P. 12(e) for an order requiring a more definite statement.

By separate brief filed concurrently with this one, Comcast moves under Fed. R. Civ. P. 12(b)(2) (lack of personal jurisdiction) or 12(b)(3) (improper venue). Comcast submits that a ruling in favor of Comcast as to that motion may moot this one.

The parties conferred about these motions on January 28, 2016, but reached no agreement.

Dated: February 3, 2016

Respectfully submitted,

/s/ Thomas J. Tallerico

Daniel J. Goettle (02933)
Jeffrey W. Lesovitz (314925)
Stephanie M. Papastephanou (316227)
BAKER & HOSTETLER LLP
2929 Arch Street
Cira Centre, 12th Floor
Philadelphia, PA 19104-2891
Telephone: 215.568.3100
Facsimile: 215.568.3439

Thomas J. Tallerico (P23662)
BODMAN PC
201 W. Big Beaver Road, Suite 500
Troy, MI 48084
248-743-6000

Attorneys for Defendant
COMCAST CORPORATION
Email:
dgoettle@bakerlaw.com
jlesovitz@bakerlaw.com
spapastephanou@bakerlaw.com
ttallerico@bodmanlaw.com

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COMCAST CORPORATION'S BRIEF IN SUPPORT OF ITS MOTIONS TO DISMISS PROGME'S INDIRECT INFRINGEMENT & WILLFULNESS CLAIMS UNDER FED. R. CIV. P. 12(B)(6), AND TO DISMISS CERTAIN DIRECT INFRINGEMENT CLAIMS UNDER FED. R. CIV. P. 12(B)(6) OR, ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT UNDER FED. R. CIV. P. 12(E)

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Local Rule 7.1(d)(2) 1

I. STATEMENT OF ISSUES PRESENTED

Pursuant to Local Rule 7.1(d)(2), Comcast asks the Court to decide the following issues in connection with this motion: (1) whether Progme's indirect infringement allegations – allegations of inducing and contributing to the infringement of others – willful infringement and certain direct infringement allegations (counts III-VI) should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief can be granted; and (2) alternatively, whether Progme should provide a more definite statement with respect to its direct infringement claims in counts III-VI of the complaint.

II. CONTROLLING AUTHORITY FOR RELIEF SOUGHT

The controlling authority for Comcast's motion is as follows:

(1) For Comcast's motion to dismiss for failure to state a claim, Fed. R. Civ. P. 8(a), 11(b), 12(b)(6), 35 U.S.C. §§ 271(a)-(c) & 284. Additionally, jurisprudence from the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit and the Federal Circuit construing and applying those authorities is controlling;

(2) For Comcast's motion for a more definite statement, Fed. R. Civ. P. 12(e). Additionally, jurisprudence from the United States Supreme Court and the United States Courts of Appeals for the Sixth Circuit and Federal Circuit construing and applying those authorities is controlling.

III. INTRODUCTION

Progme's 99-page complaint against 17 defendants might qualify as voluminous, but it is devoid of substance. The vast majority of the pages are filled with what appears to be computer code copied from third-party websites like "community.cablelabs.com" (*see, e.g.*, pp. 56-60, 61-77, 82-87, 92) and "docjar.com" (*see, e.g.*, pp. 78-81). Notably, as to four of the five counts against Comcast, there is no allegation linking the third-party computer code to Comcast or any Comcast product or offering – the complaint simply points to the third-party code and states that Comcast infringed when implementing this code in its "cable television networks." Nowhere does the complaint state a single fact supporting any notion that Comcast even knew about the third-party code let alone implemented it; nowhere does the complaint in any way attempt to explain what this third-party code has to do with Comcast.

As to all allegations of indirect infringement against Comcast, aside from mentioning the boilerplate phrase "inducement and/or contributory infringement" once per count, the complaint nowhere identified any element of inducement or contributory infringement, let alone alleged any fact that could support such elements. The same is true for the prayer for a finding of willful infringement. Therefore, as to the direct infringement allegations in counts III-VI and as to all charges of indirect and willful infringement, Progme's complaint fails to "meet the minimum standards imposed by [Fed. R. Civ. P.] 11." *Judin v. United States*, 110 F.3d 780, 784 (Fed. Cir. 1997) (reversing trial court's denial of the defendant's sanction motion, finding an abuse of discretion where the plaintiff's lawyer did not make a "reasonable effort to ascertain whether the accused devices satisfied" the patent claims).

About two weeks after filing its complaint, Progme dismissed 16 defendants, all *with* prejudice, leaving Comcast as the sole remaining defendant. And although Comcast alerted counsel for Progme as to the many pleading deficiencies identified in this motion, Progme refused to take any corrective action, forcing Comcast to file this motion.

Specifically, pursuant to Fed. R. Civ. P. 12(b)(6), Progme's complaint failed to state a claim upon which relief can be granted for (1) induced infringement under 35 U.S.C. § 271(b); (2) contributory infringement under 35 U.S.C. § 271(c); and (3) willful infringement. Progme failed to allege any third-party direct infringement, a prerequisite to charging Comcast with inducing or contributing to such direct infringement. Progme further failed to allege any facts regarding Comcast's pre-suit knowledge of the asserted patent, a required element not only of inducement and contributory infringement but also of willful infringement. Furthermore, though specific intent is a required element of inducing infringement, Progme failed to allege specific intent, let alone identify any fact related to such intent. And Progme failed to identify, let alone plead any facts tending to show, a component of the invention for which there are no noninfringing substitutes, a prerequisite to properly pleading contributory infringement. For the reasons provided, this Court should therefore dismiss all Progme claims of indirect and willful infringement for failing to state a claim upon which relief can be granted.

Furthermore, as to Progme's claims of Comcast direct infringement in counts III-VI, Progme failed to lay out any fact associating Comcast with the allegedly infringing activity. Instead, Progme appears to have merely copied computer code from third-party websites and then, with no factual basis or support, simply states that Comcast and since-dismissed defendants Bright House Networks, Cablevision, Charter Communications and Time Warner each "individually in their respective cable television networks" infringed because of the copied code. But Progme nowhere identifies, for any defendant, what service or offering the code relates to or where in it is used in the "cable television network." Therefore, the direct infringement claims in these counts should be dismissed under Fed. R. Civ. P. 12(b)(6). Alternatively, Comcast moves for an order requiring Progme to provide a more definite statement as to these counts pursuant to Fed. R. Civ. P. 12(e).

IV. FACTUAL BACKGROUND

A. Progme's conclusory accusations of indirect and willful infringement fail to identify any direct infringer, pre-suit knowledge of the patent, specific intent, no noninfringing substitutes, or any fact relevant to willfulness.

Progme Corporation ("Progme") filed this action against Comcast and sixteen other defendants, alleging infringement of U.S. patent no. 8,713,425 ("the '425 Patent"). (Dkt. 1, Ex. A). Progme has since dismissed all other defendants but did not amend the complaint. (Dkt. 4). Progme asserted five separate counts of infringement against Comcast, four of which – counts III-VI – were also asserted against various other defendants.

As to each of the five counts against Comcast, the entirety of Progme's allegation of indirect infringement is in a single sentence that accused Comcast of "infringing ... indirectly by way of inducement and/or contributory infringement ... the '425 Patent in this judicial district and elsewhere." (*Id.*, ¶¶ 49, 84, 89, 93 & 98). The counts (and complaint generally) nowhere identified any third party responsible for direct infringement or even implied who such a third party might be – a prerequisite of pleading indirect infringement. Instead, in paragraph after paragraph, Progme asserted only that Comcast performed certain activity and committed acts of infringement. (*Id.*, ¶¶ 50, 56-72, 83-101). Furthermore, the counts and the complaint in general nowhere mentioned pre-suit knowledge of the patent – another requirement for pleading indirect infringement. Nowhere in the complaint is there a mention of specific intent or a single fact related to Comcast intent to induce infringement, a requirement for pleading inducement. Furthermore, the counts, and complaint generally, made no mention of any component of a claimed apparatus that has no substantial noninfringing use – a pleading requirement of contributory infringement. And nowhere in the complaint is there a single fact relevant to a charge that any Comcast infringement was willful. Instead, the complaint simply includes a "prayer for relief" in the form of "treble damages for willful infringement". (*Id.*, ¶¶ 110.C).

B. Progme asserted that Comcast had constructive notice of the patent based on patent marking on a website but nowhere alleged that Comcast accessed the website or even knew of the existence of Progme before the complaint.

While the complaint includes no assertion that Comcast had actual knowledge of the patent, it does allege that Comcast had constructive *notice* (not knowledge) of the patent. Such alleged notice is based on Progme's alleged marking of "the patent number. . . on the PrintHD.TV home page (located at www.printhd.tv) web page." (*Id.*, ¶ 105). The complaint states that such "labelling at the bottom of the page [provided] constructive notice thereof pursuant to 35 U.S.C. § 287." (*Id.*, ¶ 105; *see also* ¶¶ 106 & 107). Notably, however, the complaint included no allegation that Comcast had actually viewed any such web page or even knew of the existence of Progme, its web page, or PrintHD.TV.

C. Counts III-VI merely identified source code from a third-party and stated that, based on the code, Comcast and other defendants directly infringed – without any factual allegation linking the third-party code to any Comcast service or offering.

Progme alleges four counts against Comcast and at least four other since-dismissed companies. For each count, Progme alleges that Comcast and others infringed based on computer code found on a third-party website ("community.cablelabs.com" in Counts III, IV, VI and "docjar.com" in Count V), without ever identifying a factual link between the computer code and Comcast. (*See* Dkt. 1, ¶¶ 87, 91, 96, 101).

Progme also failed to specify any Comcast product or offering in these counts that implemented the computer code, instead broadly referring to its "cable television networks" (counts III-IV); "cable television transmission and/or receiver systems" (count V); and "cable television upnp Home Network systems, services and devices" (count VI). (*See* Dkt. 1).

V. ARGUMENT

A. Applicable Law

Progme's claims against Comcast for indirect and willful infringement of the '425 patent as to all counts should be dismissed because they fail to allege facts sufficient to state a plausible claim for relief under the standards articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The same is true for the claims of direct infringement in counts III-VI.

Although a complaint need not recite detailed factual allegations, Progme's "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Addiction & Detoxification Inst., L.L.C. v. Aharonov*, No. 14-10026, 2015 WL 631959, at *2 (E.D. Mich. Feb. 13, 2015) (dismissing claims for indirect and willful infringement under Fed. R. Civ. P. 12(b)(6)) (citing *Twombly*, 550 U.S. at 555). Under Fed. R. Civ. P. 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To survive a motion under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," must be disregarded. *Id*. "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

Turning to the substantive claims, proof of inducement requires (1) direct infringement by another; (2) knowledge of the patent; and (3) specific intent to cause the direct infringer to perform acts knowing that the acts constituted infringement. *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1303, 1306 (Fed. Cir. 2006). Just a few months ago, the Supreme Court reaffirmed the requirement for knowledge of the patent for inducement, stating that induced infringement "can only attach if the defendant knew of the patent ….'" *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015) (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011)).

Like inducement, contributory infringement requires: (1) direct infringement by another and (2) knowledge of the patent. *See Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1326 (Fed. Cir. 2010). Contributory infringement further requires: (3) that a component provided by the accused contributory infringer have no substantial non-infringing uses; and (4) that the component be a material part of the invention. *Id*. The accused contributory infringer must also know (5) "that the combination for which [its] component was especially designed was both patented and infringing." *Global-Tech.*, 131 S. Ct. at 2067 (internal quotation marks omitted); *see also Commil*, 135 S. Ct. at 1926 ("[C]ontributory infringement requires knowledge of the patent in suit and knowledge of patent infringement.").

To survive a motion to dismiss for failing to state a claim, the complaint must contain allegations of facts sufficient to plausibly demonstrate the elements of inducement and contributory infringement. For example, as to inducement, the U.S. Court of Appeals for the Federal Circuit stated, "[t]o survive [a] motion to dismiss, [the complaint] must contain facts plausibly showing that [the defendant] specifically intended [a third party] to infringe . . . and knew that the [third party's] acts constituted infringement." *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012). "[I]nducement requires that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another's infringement." *Id.* (quoting *DSU*, 471 F.3d at 1306) (internal quotes omitted).

To prevail on a claim of direct infringement against Comcast, Progme must prove that *Comcast* performed some act of infringement, not that some third-party had computer code that, if implemented by Comcast, would result in direct infringement. 35 U.S.C. § 271(a).

B. The Court should dismiss Progme's allegations of indirect infringement under Fed. R. Civ. P. 12(b)(6) because the Complaint nowhere identifies a direct infringer or pleads other required elements for inducement or contributory infringement.

1. Progme's failure to plead facts identifying, or at least implying the existence of, a third-party direct infringer is fatal to all of its indirect-infringement claims because there can be no indirect infringement if no direct infringement.

Though accusing Comcast of inducing and contributing to infringement, the complaint nowhere identified any directly-infringing third party or set forth a single fact from which the identity of such a third-party could be inferred. To the contrary, every paragraph in each of the relevant counts in the complaint contained allegations related to, at most, only the activities of Comcast. (Dkt. 1, ¶¶ 50, 56-72, 83-101). For example, in count I, the complaint alleged that Comcast directly infringed the patent, that Comcast deployed “servlets,” and that Comcast “committed and continues to commit acts of infringement” based on the servlets. (*Id*. at ¶¶ 50-72). While once mentioning the words “inducement and/or contributory infringement,” the count nowhere identified or implied the identity of any direct infringer. Similarly, for counts III-VI, the complaint identified Comcast as a direct infringer, stated that Comcast committed and continued to commit acts of infringement, mentioned the phrase “inducement and/or contributory infringement,” and referred to various computer code portions apparently copied into the complaint from third-party websites. (*Id*. at ¶¶ 84-87 (count III), ¶¶ 89-91 (count IV), ¶¶ 93-96 (count V), & ¶¶ 98-101 (count VI)). But nowhere is there, by word or implication, any reference to any third-party direct infringer.

Progme’s failure to plead any fact, let alone sufficient facts, to identify a third-party direct infringer, or to at least support an inference that a direct infringer other than Comcast even existed, is fatal to all of its indirect-infringement claims against Comcast. Therefore, all of Progme’s indirect-infringement claims should be dismissed for failing to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). *In re Bill of Lading*, 681 F.3d at 1335 (“To state a claim for indirect infringement, therefore, a plaintiff need not identify a specific direct infringer if it pleads facts sufficient to allow an inference that at least one direct infringer exists.”).

2. **Alternatively, Progme’s failure to plead that Comcast had actual knowledge of the patent before the complaint is fatal to all of Progme’s indirect infringement claims.**

Progme’s failure to plead actual pre-suit knowledge of the patent also is fatal to all of its indirect infringement claims. Indirect infringement based on either inducement or contributory infringement requires pre-suit knowledge of the patent-in-suit. *Commil*, 135 S. Ct. at 1926 (citing *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488, (Aro II)). To properly plead indirect infringement, Progme must have “plead sufficient facts . . . for the Court to infer that the defendants had knowledge of [the plaintiff's] patent….” *MONEC Holding AG v. Motorola Mobility, Inc.*, 897 F. Supp. 2d 225, 229 (D. Del. 2012) (citations omitted) (granting defendants’ motion to dismiss indirect infringement claims); *see also JDS Techs., Inc. v. Avigilon USA Corp.*, No. 15-10385, 2015 WL 3603525, at *2 (E.D. Mich. June 5, 2015) (“[P]utting *Global–Tech* together with *Iqbal*, the question before the Court on defendants' motions to dismiss is whether [the plaintiff] has plead sufficient facts ... for the Court to infer that the defendants had knowledge of [the patents-in-suit] and that their products infringed on those patents.”) (citations omitted).

The knowledge requirement must be met by a showing of either actual knowledge or willful blindness – but constructive notice (such as by marking a website with a patent number) is not enough. *Global-Tech*, 131 S. Ct. at 2068; *see also MONEC*, 897 F. Supp. 2d at 232 n. 6 (stating that "actual (*not constructive*) knowledge of the patent-in-suit is necessary to state a claim for indirect infringement . . . under *Global-Tech*, unless the patentee is claiming willful blindness") (emphasis added). Progme's complaint, however, nowhere included any allegation that Comcast had actual knowledge of the patent or was willfully blind to the existence of the patent before the lawsuit. Therefore, this Court should dismiss each of Progme's indirect infringement claims of inducement and contributory infringement. *See Aharonov*, 2015 WL 631959 at *2 (dismissing indirect infringement claims that failed to state facts tending to show defendants had knowledge of the patent before the lawsuit was filed); *Addiction & Detoxification Institute, LLC v. Carpenter*, 2014 WL 3819349, *2 (E.D. Mich. Aug. 4, 2014) ("Again, the court must grant Defendants' motion to dismiss the indirect infringement claim, as Plaintiff has failed to state facts that allege that Defendants had knowledge of the '411 Patent before this lawsuit…."), *aff'd*, *Addiction & Detoxification Institute, LLC v. Carpenter*, 620 Fed. Appx. 934 (Fed. Cir. 2015).[1]

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[1] It should be noted that one court in this district found induced-infringement

Furthermore, the allegations in the complaint related to constructive *notice* (not knowledge) by marking a website with the patent number do not satisfy the requirement to plead actual knowledge. (Dkt. 1, ¶ 105); *see Global Tech*, 131 S. Ct. at 2068 (finding that either actual knowledge or willful blindness required for knowledge); *see also MONEC*, 897 F. Supp. 2d at 232 n. 6 (stating that "actual (*not constructive*) knowledge. . .necessary to state a claim for indirect infringement . . . under *Global-Tech*, unless the patentee is claiming willful blindness"). Because Progme failed to plead that Comcast had actual knowledge of the patent-in-suit before the filing of the suit, all of Progme's indirect infringement claims should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

3. Progme also failed to plead specific intent, a required inducement element, and therefore, all inducement claims should be dismissed for this alternate reason under Fed. R. Civ. P. 12(b)(6).

Progme also failed to satisfy pleading requirements for all of its induced-infringement claims because the complaint nowhere alleged any specific intent to

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allegations sufficient absent pre-suit knowledge of the patent. *See Serv. Sols. U.S., LLC v. Autel U.S. Inc.*, No. 13-10534, 2013 WL 5701063, at *9 (E.D. Mich. Oct. 18, 2013). But this decision appears to be an outlier, given the Federal Circuit's affirmance in *Carpenter* and at least two other decisions in this district. Those two decisions found pre-suit knowledge a requirement to sufficiently plead a claim for induced infringement. *See JDS Techs., Inc. v. Avigilon USA Corp.*, No. 15-10385, 2015 WL 3603525, at *1-2 (E.D. Mich. June 5, 2015); *Addiction & Detoxification Inst., L.L.C. v. Aharonov*, No. 14-10026, 2015 WL 631959, at *2 (E.D. Mich. Feb. 13, 2015). *See also Proxyconn Inc. v. Microsoft Corp.*, No. 11-1681, 2012 WL 1835680, at *7 (C.D. Cal. May 16, 2012); *MONEC Holding AG v. Motorola Mobility, Inc.*, 897 F. Supp. 2d 225, 232 (D. Del. 2012).

induce infringement. As explained above, one element of inducement requires specific intent to cause direct infringement by another. *DSU*, 471 F.3d at 1306. Progme's complaint, however, nowhere even used the word "intent" let alone included a single fact that could somehow support an allegation that Comcast specifically intended to induce direct infringement. (Dkt. 1, ¶¶ 50-72 (count 1), ¶¶ 84-87 (count III), ¶¶ 89-91 (count IV), ¶¶ 93-96 (count V), & ¶¶ 98-101 (count VI)). While once mentioning the phrase "inducement and/or contributory infringement" in each count, the complaint nowhere included a single intent-related allegation or fact.

"To survive [a] motion to dismiss, [the complaint] must contain facts plausibly showing that [a defendant] specifically intended [a third party] to infringe the [patent] and knew that the [third party's] acts constituted infringement." *In re Bill of Lading*, 681 F.3d at 1339 (citing *DSU*, 471 F.3d at 1306 (Fed. Cir. 2006). The Federal Circuit recently affirmed a decision of this District that dismissed under Fed. R. Civ. P 12(b)(6) inducement allegations very similar to those alleged here. *See Addiction & Detoxification Inst. L.L.C. v. Carpenter*, 620 Fed. Appx. 934, 935 (Fed. Cir. 2015). In *Carpenter* as here, the complaint included a conclusory allegation that the defendants induced infringement without pleading a single intent fact. In affirming the dismissal, the Federal Circuit found that the complaint "contains no allegations regarding intent or any specific acts caused by

Defendants" as to induce infringement. 620 Fed. Appx. at 938. In affirming, the Federal Circuit concluded, "[t]o state a claim for induced infringement, a plaintiff must allege that the defendant knew of the patent and that the induced acts constitute patent infringement." *Id.* (citing *Commil*, 135 S. Ct. at 1926). As in *Carpenter*, this Court should dismiss all of Progme's inducement claims against Comcast under Fed. R. Civ. P. 12(b)(6). *See also MONEC*, 897 F. Supp. 2d at 234 (citations omitted) (finding a claim failed to establish the requisite intent where it asserted the conclusory allegation that each defendant "induced and will continue to contribute to and/or induce the infringement of the [patent] by others."); *Aharonov*, 2015 WL 631959, at *2 (dismissing a claim for indirect infringement for failing to state facts alleging pre-suit knowledge of the patent and specific intent to cause infringement).

4. Progme's pleadings failed to allege that any "component" of any patented invention was not suitable for substantial noninfringing use and therefore, this Court should dismiss each contributory-infringement claim.

The Court should dismiss Progme's contributory-infringement claim under Fed. R. Civ. P. 12(b)(6) because the complaint nowhere identified any "component" of an invention, let alone alleged that such component was not suitable for any substantial noninfringing use under 35 U.S.C. §271(c). In pertinent part, contributory infringement may hold liable anyone who sells or offers to sell "a component of a patented machine, manufacture [or] combination…" that is "especially made or especially adapted for use in an infringement" so long as the component is not "suitable for substantial noninfringing use." 35 U.S.C. § 271(c). A pleading for contributory infringement is deficient if it does not at least allow the inference that any identified "component" has no "substantial noninfringing use." *In re Bill of Lading*, 681 F.3d at 1337 ("To state a claim for contributory infringement . . . a plaintiff must, among other things, plead facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses."). Because Progme's complaint fails to identify any alleged "component" of a patented invention, let alone allege that such unidentified component has no substantial noninfringing use, this Court should dismiss each of Progme's claims for contributory infringement for this alternate reason.

C. Progme's failure to plead pre-suit knowledge of the patent is fatal to its willful infringement claims.

While not mentioning willful infringement in any of its counts of infringement, Progme's complaint includes a "prayer for relief" in the form of "treble damages for willful infringement". (*Id.*, ¶ 110.C). But as with indirect infringement, to properly plead a claim for willful infringement, Progme was required to allege pre-suit knowledge of the patent. A decision from this district explained, "[i]n order to plead that a party has willfully infringed a patent, the party must have had knowledge of the patent; and post-filing knowledge is not sufficient to support such a claim." *Carpenter*, 2014 WL 3819349, *aff'd Carpenter*, 620 Fed. Appx. 934 (Fed. Cir. 2015). And as also explained above, the complaint nowhere included any allegation, or fact that could plausibly support an allegation, that Comcast had knowledge of the patent before this suit was filed. Constructive notice does not rise to actual knowledge as "the issue of willfulness turns on the actual knowledge of the infringer, and is unrelated to the adequacy of constructive notice by the patentee." *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1446 (Fed. Cir. 1998*); see also Imonex Servs., Inc. v. W.H. Munzprufer Dietmar Trenner GMBH*, 408 F.3d 1374, 1377 (Fed. Cir. 2005) (stating that "[c]onstructive notice, as by marking a product with a patent number, is insufficient to trigger this duty.") (citing *Nike*, 138 F.3d at 1446).

"[A] willfulness claim asserted in the original complaint must necessarily be grounded exclusively in the accused infringer's pre-filing conduct." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007); *see also Aharonov*, 2014 WL 3819349, at * 2 (dismissing claims for willful infringement because "the complaint [did] not recite specific facts explaining if and when the defendants had knowledge of the [] patent" and stating "[i]n order to plead that a party has willfully infringed a patent, the party must have had knowledge of the patent; and post-filing knowledge is not sufficient to support such a claim."). Because there is no allegation of pre-suit knowledge of the patent, this Court should dismiss any claim for willful infringement under Fed. R. Civ. P. 12(b)(6).

D. The Court should dismiss, or order a more definite statement as to, Progme's claims for direct infringement in counts III-VI because the counts do not allege what the copied third-party code has to do with Comcast or its "cable television network."

Progme's claims for direct infringement in counts III-VI should be dismissed because they fail to comply with even the bare-bone assertions required by the now-defunct Form 18, let alone allege facts sufficient to state a plausible claim for patent infringement under *Twombly* and *Iqbal*. In each of these counts, Progme copied what appears to be computer code from third-party websites and then accuses Comcast of infringement based on the code. (*See* Dkt. 1, ¶¶ 87, 91, 96, 101). But the counts nowhere state what the third-party code has to do with Comcast or allege a single fact that could support the notion that Comcast implemented the code anywhere in its "cable television network." Progme comes nowhere close to pleading facts sufficient to put Comcast on notice of its specific allegedly infringing products or services. *See Carpenter*, 620 Fed. Appx. at 937 (affirming dismissal of the plaintiff's complaint and noting that "[t]here must be some allegation of specific services or products of the defendants which are being accused" to "put Defendants on notice as to what activity, method, or procedure is alleged to infringe").

Alleging that Comcast infringed through its "cable television network" without providing a "more specific identification of the products" fails to put Comcast on notice of what Progme accuses of infringement. *See Lantiq N. Am., Inc. v. Ralink Tech. Corp.*, No. 11-00234, 2011 WL 2600747, at *6-7 (N.D. Cal. June 30, 2011) (finding that broad categories of products listed – including, for example, access point, router, Ethernet, network interface controller, universal serial bus (USB), peripheral component interconnect (PCI), PCI express (PCle); and/or 802.11x products – failed to put defendant on notice absent "more specific identification of the products in any given category that are allegedly infringing"); *Hewlett-Packard Co. v. Intergraph Corp.*, No. 03-2517, 2003 WL 23884794, at *1 (N.D. Cal. Sept. 6, 2003) (finding that allegations of infringement by "software and hardware products" failed to provide "fair notice" where defendant "produces some 150 core technology platforms which are implemented in over 4000 end-user application products"); *Prism Techs., LLC v. AT&T Mobility, LLC*, No. 8:12-CV-122, 2012 WL 3867971, at *5 (D. Neb. Sept. 6, 2012) (finding that allegation of infringement by "various wireless products and data services" was "considerably more generic" than "electric motor" in Form 18, and so vague that it failed to provide adequate notice to defendant as to how it allegedly infringes). Based on the allegations made in Progme's complaint, Comcast is unable to discern what products or services are accused of infringement. For this reason, this Court should dismiss Progme's claims pursuant to 12(b)(6) for failure to state a claim for which relief can be granted.

In the event the Court determines that Progme's direct infringement claims in counts III-VI should not be dismissed, Comcast requests, pursuant to Fed. R. Civ. P. 12(e), that Progme be required to provide a more definite statement of its direct infringement allegations. "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." *Swierkiewicz v. Sorema NA.*, 534 U.S. 506, 514 (2002). This is appropriate where a party's initial pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e).

In *Bay Indus., Inc. v. Tru-Arx Mfg., LLC*, the court explained its reasoning for requiring a more definite statement to include the identification of the product or products that would be allegedly infringing. No. 06-C-1010, 2006 WL 3469599, at *2 (E.D. Wis. Nov. 29, 2006). First it was unreasonable to require defendant "to compare its approximately 40 products to at least 20 claims of the [patent] to formulate a response." *Id.* Second, an allegedly infringing product or other limiting parameter would focus discovery such that plaintiff would not seek discovery of defendant's entire line of products. *Id.* "Finally, requiring that plaintiff identify the product or products that allegedly infringe its patent insures that plaintiff has a proper basis for bringing suit in the first place" consistent with Fed. R. Civ. P. 11. *Id.*; *see also Judin*, 110 F.3d at 784. The same policy concerns apply here where Comcast should not be required to compare the entirety of its "cable television network" to the patent's claims; should not be forced to incur unnecessary discovery costs; and should be satisfied that there is a proper basis for the law suit.

Here, for all of the reasons detailed above, Progme's allegations are so vague and conclusory as to frustrate Comcast's efforts to prepare a responsive pleading and a meaningful defense. Accordingly, Progme should, at a minimum, be ordered to provide a more definite statement as to these claims.

VI. CONCLUSION

The Court should dismiss Progme's induced, contributory, and willful infringement claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The Court should dismiss claims of direct infringement alleged in counts III-VI of the complaint, also for failing to state a claim under Fed. R. Civ. P. 12(b)(6). Alternatively, the Court should require Progme to provide a more definite statement as to direct infringement alleged in counts III-VI pursuant to Fed. R. Civ. P. 12(e).

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Respectfully submitted,

/s/ Thomas J. Tallerico
Daniel J. Goettle (02933)
Jeffrey W. Lesovitz (016072006)
Stephanie M. Papastephanou (316227)
BAKER & HOSTETLER LLP
2929 Arch Street
Cira Centre, 12th Floor
Philadelphia, PA 19104-2891
Telephone: 215.568.3100
Facsimile: 215.568.3439

Thomas J. Tallerico (P23662)
BODMAN PC
201 W. Big Beaver Road, Suite 500
Troy, MI 48084
248-743-6000

Attorneys for Defendant
COMCAST CORPORATION
Email:
dgoettle@bakerlaw.com
jlesovitz@bakerlaw.com
spapastephanou@bakerlaw.com
ttallerico@bodmanlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2015, the foregoing COMCAST CORPORATION'S MOTIONS TO DISMISS PROGME'S INDIRECT INFRINGEMENT & WILLFULNESS CLAIMS UNDER FED. R. CIV. P. 12(B)(6), AND TO DISMISS CERTAIN DIRECT INFRINGEMENT CLAIMS UNDER FED. R. CIV. P. 12(B)(6) OR, ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT UNDER FED. R. CIV. P. 12(E) was filed using the Court's CM/ECF, which will send notice of the filing via electronic mail to all counsel of record designated to receive such notice.

/s/ Thomas J. Tallerico